INDEX

	Page
Authorities Cited	This page
Grounds for Rehearing	
I. Grounds relied upon by the Court of Appeals in its decision below and by respondent in its brief filed herein in opposition to the Petition for Writ of Certiorari involve the deprivation of procedural due process of law to Petitioner	2
II. A conflict of decisions between circuits has arisen subsequent to the filing of the Petition for a Writ of Certiorari	4
III. The Brief in Opposition to Petition for Writ of Certiorari filed by Respondents Contains Substantial inaccuracies	4
Conclusion	5
Certificate of Counsel	7

AUTHORITIES CITED

Cases:

Armstrong v. Manzo, ___ U.S. ___ 14 L.Ed. 2d 62, 66, 85 S.Ct. ___	3
Pearson v. Dennison, 353 F. 2d 24	4
Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, 572	3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

NO. 684

SID RICHARDSON CARBON & GASOLINE CO.,
Petitioner,

v.

THE MOORE COMPANY OF SIKESTON, MISSOURI, AND J. E. MOORE, JR.,
Respondents

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and
The Associate Justices of the
Supreme Court of the United States:

Petitioner, Sid Richardson Carbon & Gasoline Co., respectfully requests a rehearing of its Petition for

a Writ of Certiorari refused by order of this Court on February 28, 1966, and as grounds therefor says:

I. *Grounds relied upon by the Court of Appeals in its decision below and by respondent in its brief filed herein in opposition to the Petition for Writ of Certiorari involve the deprivation of procedural due process of law to Petitioner.*

A. Consideration of orders of the District Court entered before Petitioner was served with summons depriving petitioner of a right to be heard violates Constitutional requirements of due process of law.

B. Tolling of a statute of limitations by *ex parte* action is inconsistent with due process.

ARGUMENT

The District Court found that plaintiffs lacked diligence in securing service of summons upon defendant. The Court of Appeals held that the question of diligence was immaterial, and that mere filing of the complaint was sufficient to toll the statute of limitations.

In its opinion and in the Brief in Opposition to Petition for Writ of Certiorari filed herein by Respondents, reliance is had upon orders of the District Court restating plaintiffs' cause, after dismissal, and permitting amendment of the complaint. Such orders

were entered by the District Court prior to service upon petitioner, and to hold such orders efficacious in denying the right of this petitioner to urge want of diligence by Respondents violates the fundamental premise of due process of law for litigants.

In *Armstrong v. Manzo*, ____ U.S. ____, 14 L.Ed. 2d 62, 66, 85 S.Ct. ____, this Court made the following significant statement:

> "A fundamental requirement of due process is 'the opportunity to be heard.' Grannis v. Ordean, 234 US 385, 394, 58 L.Ed. 1363, 1369, 34 S.Ct. 779. It is an opportunity which must be granted at a meaningful time and in a meaningful manner."

Without the necessity of entering into a discussion of the procedural-substantive dichotomy concerning statutes of limitations, it is sufficient to state that statutes of limitations are enacted in the interests of fairness to defendants. To deprive a defendant of the protection of such statutes without regards to diligence of the plaintiff, by tolling the statute by mere filing of a complaint, is contrary to principles of fairness and inconsistent with the broad definition of due process of law which has been championed by this Court.

As stated in *Pennoyer v. Neff*, 95 U.S. 714, 24 L.

Ed. 565, 572, such action is "contrary to the first principles of justice."

II. *A conflict of decisions between circuits has arisen subsequent to the filing of the Petition for a Writ of Certiorari.*

ARGUMENT

The Court of Appeals of the Ninth Circuit, in *Pearson v. Dennison*, 353 F. 2d 24, considered a case similar to the instant case in which there had been a dismissal for want of prosecution, reinstatement, and a subsequent dismissal for lack of diligence in prosecution. Unlike the Court of Appeals in the instant case, the Ninth Circuit held that the prior reinstatement did not become "the law of the case" and that the District Court, on its own motion, could dismiss for want of diligence in prosecution.

III. *The Brief in Opposition to Petition for Writ of Certiorari filed by Respondents Contains Substantial inaccuracies.*

STATEMENT

Respondents have presented inaccurately several material matters.

At page 2 of Respondents' Brief, it is represented that "another district judge in the same case had

previously overruled the identical contentions of the petitioner with regard to the alleged lack of diligence . . ." Such action was taken before petitioner had been served with process.

At page 3 of Respondents' Brief it is stated that petitioner's motion to quash service was sustained on the grounds that petitioner *was not subject to service of process in Missouri.* Judge Harper expressly overruled petitioner's motion to dismiss for lack of jurisdiction over the person, and left such question open. (Record p. 10-11).

This was not an instance of "forum-shopping" as alleged by Respondents at page 16. Judge Harper, as presiding judge had assigned the case to Judge Meredith. Judge Meredith decided the matter upon different facts and different questions than were considered by Judge Harper on any prior occasion. Judge Meredith's decision was the first such decision made after service of valid process upon petitioner.

CONCLUSION

The result sought by petitioner is in accord with the reasoning of prior decisions of this Court, and would remove the distressing uncertainties and conflicts into which lower courts have fallen.

Petitioner submits that the limitation statute in question, if not substantive in nature at least creates

a right of which a litigant should not be deprived without due process of law. The action of the Court of Appeals allows no other conclusion but that such statute may be tolled even in the absence of due process. Because the United States Court of Appeals for the Eighth Circuit erroneously considered that it was not bound by due process requirements, a rehearing of the petition for a writ of certiorari should be granted, and the United States Court of Appeals for the Eighth Circuit reversed.

Respectfully submitted,

RUFUS S. GARRETT, JR.
710 Fort Worth National Bank Building
Fort Worth, Texas 76102

ATTORNEY FOR PETITIONER

GARRETT & GARRETT

JACK O. KNEHANS
FINCH, FINCH, KNEHANS & COCHRANE

OF COUNSEL

CERTIFICATE

The foregoing Petition for Rehearing is presented in good faith and not for delay. It is restricted to substantial grounds available to petitioner although not previously presented to this court and to intervenning circumstances of substantial effect.

A copy of this Petition for Rehearing has been served upon Respondents by depositing copies of same, first class air mail postage prepaid, respectively addressed to Lashly, Lashly, Rava, Hyndman & Rutherford, Attorneys at Law, 705 Olive Street, St. Louis, Missouri, 63101, and to Weber Gilmore, Esq., Attorney a Law, 809 North Main, Sikeston, Missouri, 63801, Counsel of record for respondents.

Attorney for Petitioner